

**THE CITY OF SPRINGFIELD, MASSACHUSETTS**

**June 24, 2010**

**BY ELECTRONIC FILING**

**CC Docket 02-6.**

**TO THE FEDERAL COMMUNICATIONS COMMISSION:**

**The attached is a Request for Review and Waiver in Connection with Four (4)  
Decisions of the Administrator of the Schools and Libraries Division of the  
Universal Service Administrative Company filed by the City of Springfield (Mass.)  
Public Schools, for E-Rate Funding Years 2004-2005, 2005-2006, 2006-2007 and  
2007-2008.**

**Submitted by:**

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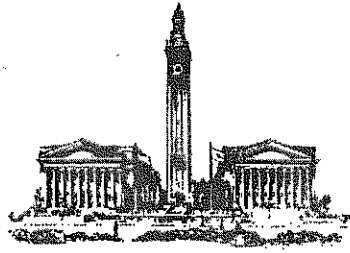
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**THE CITY OF SPRINGFIELD, MASSACHUSETTS**

**June 24, 2010**

**FILED ELECTRONICALLY**

**Marlene Dortsch, Secretary  
Federal Communications Commission  
Office of the Secretary  
9300 East Hampton Drive  
Capitol Heights, MD 20743**

**RE: CC Docket No. 02-6 - Request for Review and Waiver  
of Four (4) "Administrator's Decision on Appeal" Letters from the Schools  
and Libraries Division of the Universal Service Administrative Company**

Dear Secretary Dortsch:

**Introduction**

This is a "Request for Review and Waiver" submitted by the City of Springfield, Massachusetts ("City"), on behalf of the Springfield Public Schools ("District"), in response to four (4) decision letters ("Decision Letters") issued by the Administrator of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company (USAC). This Request for Review and Waiver is filed pursuant to 47 C.F.R. sec. 54.719 and 47 C.F.R. 1.3. This request is being filed within 60 days of the date of the decision letters, which were issued on April 26, 2010.

The District hereby appeals and requests the FCC to review and grant waivers in connection with four (4) "Administrator's Decisions on Appeal" denying

the District's appeals of the Commitment Adjustment Letters, and finding that both the District and its service provider, Achieve Telecom Network of MA, LLC ("Achieve"), are responsible for rule violations, and directing *full recovery* of the amounts disbursed for funding years 2004-2005, 2005-2006, 2006-2007 and 2007-2008, totaling \$1,792,624.00. Copies of the USAC Administrator's decisions are attached hereto as Attachment #1A (2004-2005 Funding Year); Attachment #1B (2005-2006 Funding Year), Attachment #1C (2006-2007 Funding Year), and Attachment #1D (2007-2008 Funding Year).

Due to the uniformity of issues and determinations in the four (4) Decision Letters, they are addressed together in this Request for Review and Waiver.

**Procedural History:**

On September 8, 2008, USAC issued four (4) Commitment Adjustment Letters (COMADS) seeking recovery of "all funds" disbursed by USAC/SLD from the District and its service provider, Achieve, for funding years 2004-2005, 2005-2006, 2006-2007 and 2007-2008. The District submitted an appeal of the four (4) COMADS to USAC on November 7, 2008, which is appended hereto as Attachment #2, and incorporated herein by reference. Achieve also filed appeals of the COMADS. On April 26, 2010, USAC issued the Decision Letters for each of the years on appeal, denying the appeals and directing that the funds disbursed be recovered from both the District and Achieve. (See Attachments #1A through 1D). This Request for Review and Waiver is submitted in response to the Decision Letters.

**USAC/SLD Reference Information for Each Funding Year:**

The following is a summary of the USAC information for each of the funding years and the amounts sought to be recovered from the District (referred to as the "applicant") by USAC:

**Funding Year: 2004-2005**

Applicant Name:	<b>Springfield Mass. School District</b>
Billed Entity Number:	<b>120089</b>
Form 471 Application Number:	<b>433768</b>
Funding Request Number:	<b>1207981</b>
2004-2005 Original Funding Commitment:	<b>\$6,063.00</b>
Commitment Adjustment Amount:	<b>\$6,063.00</b>
Funds Disbursed to Date:	<b>\$ 0.00</b>
Funds to be recovered from applicant:	<b>\$ 0.00</b>

**Funding Year: 2005-2006**

Applicant Name:	<b>Springfield Mass. School District</b>
Billed Entity Number:	<b>120089</b>
Form 471 Application Number:	<b>487623</b>
Funding Request Number:	<b>1352672</b>
2005-2006 Original Funding Commitment:	<b>\$1,454,553.00</b>
Commitment Adjustment Amount:	<b>\$1,454,553.00</b>
Funds Disbursed to Date:	<b>\$ 327,424.50</b>
Funds to be recovered from applicant:	<b>\$ 327,424.50</b>

**Funding Year: 2006-2007**

Applicant Name:	<b>Springfield Mass. School District</b>
Billed Entity Number:	<b>120089</b>
Form 471 Application Number:	<b>538332</b>
Funding Request Number:	<b>1490940</b>
2006-2007 Original Funding Commitment:	<b>\$1,465,200.00</b>
Commitment Adjustment Amount:	<b>\$1,465,200.00</b>
Funds Disbursed to Date:	<b>\$1,465,200.00</b>
Funds to be recovered from applicant:	<b>\$1,465,200.00</b>

**Funding Year: 2007-2008**

Applicant Name:	<b>Springfield Mass. School District</b>
Billed Entity Number:	<b>120089</b>
Form 471 Application Number:	<b>577110</b>

Funding Request Number:	<b>1595241</b>
2007-2008 Original Funding Commitment:	<b>\$1,623,600.00</b>
Commitment Adjustment Amount:	<b>\$1,623,600.00</b>
Funds Disbursed to Date:	<b>\$ 0.00</b>
Funds to be recovered from applicant:	<b>\$ 0.00</b>

**Summary of Issues:**

Pursuant to 47 CFR 1.49(c), the District offers the following summary of the issues presented in this Request for Review and/or Waiver. The District appeals from and requests a review and waiver with respect to the following determinations and conclusions by USAC for each year on appeal, pursuant to 47 CFR 54.719-54.723 and 47 CFR 1.3:

\*The determination that the District is responsible for FCC Rules violations based on a "partnership" between Achieve and the United States Distance Learning Association ("USDLA"), and the fact that Achieve solicited funds on USDLA's behalf, even though the District had no knowledge of such a partnership or solicitation, because "intent is not a factor when determining whether program rules were violated", and the information was publicly available on USDLA's website which the District "could have learned by conducting research on USDLA before applying for and accepting a grant from the organization". The retroactive imposition of this research requirement constitutes "policy" not found in the USAC appeal procedures, which is beyond the scope of the USAC authority pursuant to 47 CFR 54.702.

\*The determination that the District is responsible for FCC Rules violations because USDLA "specifically designated" and "earmarked" grants for schools selecting Achieve as a vendor, although the District had no knowledge of this.

\*The determination that the District is responsible for FCC Rules violations because Achieve "marketed" the service as a "no cost" and/or "fully funded" service, gave a "rebate" to the District, and "guaranteed" that the District would get a grant to cover the non-discount share, although no such statements were ever made to the District.

\*The determination that the District is responsible for FCC Rules violations because Achieve "waived" the District's non-discount portion of the cost, a conclusion based on the "lack of evidence" that USDLA awarded grants to other E-Rate applicants who did not select Achieve as their service provider, although the District had no knowledge of what other grants were awarded by USDLA.

\*The suggestion that that the District is responsible for FCC Rules violations because USDLA did not actually pay the grant funds to Achieve, although the District had no knowledge of this.

\*The determination that the District's competitive bid process was not "fair and open" because Achieve had an unfair competitive advantage by "guaranteeing" grants to the District, and because Achieve offered "fully funded" services to the District, where no such representations were ever made to the District.

\*The determination that the District failed to pay its non-discounted portion of the service because Achieve provided its services at no-cost to the District, where the District was awarded what it reasonably believed to be a legitimate grant from USDLA covering those costs, as authorized by USAC procedures, and where Achieve never made a "no cost guarantee" to the District.



\*The determination that "both Achieve and (the District) are responsible for FCC rule violations" because (the District) was not able to conduct a fair and open competitive bidding process based on Achieve's "no cost guarantee" and Achieve gained an unfair competitive advantage by "guaranteeing" USDLA grants designed to cover (the District's) non-discounted portion of the costs of Achieve's services", despite the fact that the District had what it reasonably believed to be a legitimate grant from USDLA covering those costs, as authorized by USAC procedures, and the District had no knowledge of any partnership or inappropriate relationship, or "guarantee" arrangement between Achieve and USDLA, and Achieve never guaranteed a "no cost" service to the District .

#### **Request for Review and Waiver:**

The District seeks the following relief: that the FCC grant the Request for Review of each of the four (4) Decision Letters and direct the USAC to discontinue recovery action against the District for the amounts ordered to be recovered. In the alternative, the District requests, pursuant to 47 C.F.R. 1.3, that the FCC grant a limited waiver of 47 C.F.R. 54.523 and 47 C.F.R. 54.504 ordering the USAC not to seek recovery of the amounts disbursed from the District on equitable grounds, in the public interest, in light of the District's lack of knowledge of, or complicity in, or willful violations of any FCC rules or USAC program rules. The reasons for this request are described below.

#### **Argument**

**I. Any partnership between Achieve and USDLA, and any solicitation of funds by Achieve on USDLA's behalf, did not rise to the level of an FCC**

**violation by the District where the District had no knowledge of such a partnership or solicitation activities. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds, and whether it is equitable to grant a limited waiver of FCC rules in the public interest.**

**Decision Letters:**

The Decision Letters acknowledged that the District maintained and argued that it had “no knowledge of any partnership between Achieve and USDLA” and “was not aware that Achieve solicited donations on behalf of USDLA”. However, the Decision Letters state, “intent is not a relevant factor when determining whether program rules were violated”, because “in this case, information about the partnership between Achieve and USDLA was publicly available on USDLA's web site”. USAC noted that USDLA's 2004, 2006 and 2007 annual reports refer to USDLA's having formed a partnership with Achieve in order to pursue E-Rate K-12 monetary allocation; and that the partnership with Achieve was providing revenue for the association and that the grant program that funds distance learning projects through E-Rate was beneficial to USDLA, was improving USDLA's revenue flow, and USDLA wanted it to continue. The Decision Letters state that “(the District) “could have learned about the partnership if it had conducted research on USDLA before applying for and accepting a grant from the organization”.

The Decision Letters also noted that documents obtained during the Special Compliance Review indicated that there was a partnership between Achieve and USDLA, stating: “In response to an information request, USDLA CEO John G. Flores specifically named Achieve as one of the members of USDLA and noted that USDLA was “fortunate that many companies who have an interest in e rate opportunities with school districts

across the country are members of USDLA." Dr. Flores also commented that as USDLA "solicit[s] donations from philanthropic groups or private donations, [it] work[s] with [school] districts attempting to support what the e rate monies allow them to do. Achieve as a Massachusetts based company has taken advantage of this opportunity." *Id.* The information received from Dr. Flores directly conflicts with (Achieve's) statements that "Achieve is not a member of USDLA."

**District Response:**

**(a) Achieve never advised the District of any partnership with USDLA.**

During the four (4) funding years in question, Mr. Robert Hamel was responsible for the District's application process for E-Rate Program Support. This included meeting with service providers, including Achieve, and receiving written materials from Achieve in response to the Applications. See Attachment #2, District Appeal to USAC, Exhibit A, Declaration of Robert Hamel, par. 2.

At the time the District applied for the funding from USAC/SLD for each of the four years on appeal, and at the time each of the USDLA grants were awarded to the District, the District had no knowledge of any "partnership" between Achieve and USDLA. See Attachment #2, Exhibit A, Hamel Declaration, pars. 4, 6.

Similarly, during that time period, the District had no knowledge of any donations solicited by Achieve on behalf of USDLA. See Attachment #2, Exhibit A, Hamel Declaration, par. 6. The District learned of these allegations for the first time upon receipt of the COMADS sometime after they were issued on September 8, 2008.

**(b) There is no "research" requirement in USAC procedures requiring an exhaustive investigation of websites, annual reports, and tax returns of granting agencies to determine if a partnership exists. This retroactive requirement is unauthorized policymaking outside the scope of USAC's authority under 47 CFR**

**54.702.**

i) The USDLA's current website has many companies listed as members, but Achieve is not listed. Should school districts automatically assume that if a company is listed as a member on this site that there is an improper partnership relationship between the company and USDLA or that the company has been soliciting donations for USDLA, in return for which USDLA is guaranteeing grant funds?

The USDLA website appears to be one of a legitimate grant organization offering grant support opportunities in the development and delivery of distance learning related services. The District is not aware of what content was available on the website during the funding years in question.

ii) USAC procedures did not require that the District research and perform exhaustive due diligence on USDLA before applying for grant – to determine if partnership existed, particularly annual reports and tax returns, documents which are not easily accessed. See Attachment #2, Exhibit C, USAC application procedures, Step 11. It is unreasonable for USAC to retroactively impose an extensive research requirement on applicants. This change to the existing USAC procedures constitutes unauthorized policy-making, which is beyond the scope of the USAC authority pursuant to 47 CFR 54.702.

**(c) The District had no knowledge of or access to the documents and statements USAC obtained from USDLA during the Special Compliance Review indicated there was a partnership between Achieve and USDLA.**

It is unreasonable for USAC to find the District committed an FCC rule violation based on documents obtained from USDLA during a Special Compliance Review suggesting a partnership relationship between Achieve and USDLA, which the

District had no knowledge or access to, which were never disclosed to the District, and which had nothing to do with the District or its E-Rate applications.

**(d) Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds, and whether it is equitable to grant a limited waiver of FCC rules in the public interest.**

It is unreasonable and inequitable for USAC to find the District committed violations of FCC rules based on information and documents which the District had no knowledge of. The District respectfully requests that the FCC direct USAC to discontinue recovery action against the District, or in the alternative, that the FCC grant a limited waiver based on equitable considerations, in the public interest.

**II. Any actions by USDLA to "specifically designate" or "earmark " grants for schools that selected Achieve as a service provider did not rise to the level of an FCC violation by the District where the District had no knowledge of such activities. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

**Decision Letters:**

The USAC Decision Letters recognized the District's argument "that it had no knowledge that the USDLA grants were specifically designated for Achieve's services". USAC acknowledged that the March 18, 2004 and the June 27, 2005 USDLA letters awarding the grants to the District explicitly stated that the grant was "not contingent upon the selection of a specific vendor".

However, USAC determined that USDLA grants were specifically earmarked for services provided by Achieve, because: (a) documentation in SLD records and in the submitted appeal papers that show the grants were specifically earmarked for school districts that selected Achieve as their service provider; (b) subsequent USDLA letters to the District reaffirming the grants referred to the project as the "AchieveXpress

Telecommunications distance learning project," instead of the "Springfield Public School District Digital Divide Project" as stated in the District's grant application; and (c) neither Springfield, Achieve, or USDLA have provided any evidence to refute this determination.

**District Response:**

(a) The DISTRICT had no knowledge of USDLA funds being "specifically designated" for schools that used Achieve as a service provider. In fact, John Flores, the Executive Director of USDLA, sent letters to the District's Superintendent of Schools on March 18, 2004 and June 27, 2005 indicating that the USDLA Grant awards were *not contingent* upon the selection of a specific vendor:

*"We understand the project will be funded primarily with E-rate funds from the Schools and Libraries Division (SLD) of the Universal Service Administrative Company and will be dependent upon the approval of the SLD. While you may have been referred to USDLA by a vendor for this project, please understand that our grant is to your school district and is not dependent upon your selection of any specific vendor."*

Emphasis supplied. See Attachment #2, Exhibit B-1, USDLA letter to Superintendent of Schools Joseph Burke, dated March 18, 2004, 3rd par; and Attachment #2, Exhibit B-2, USDLA letter to Superintendent of Schools Joseph Burke, dated June 27, 2005, 4th par. See also Attachment #2, Exhibit A, Hamel Declaration, par. 4.

The Decision Letters do not identify any "documentation" and "submitted appeal papers" which show that the grants were specifically earmarked for Achieve's services other than letters from USDLA to the District confirming award of the grants, which referred to the project as the "AchieveXpress Telecommunications distance learning project", which are addressed in paragraph (b) below.

(b) The District's grant applications to USDLA referred the selection of Achieve

Telecom as its selected vendor, and on the first page under the heading "Brief Description of Project", the District wrote: "SPS has contracted for this service with an eligible telecommunications provider, Achieve Telecom Network of MA LLC., who offers a distance learning transmission service, called *AchieveXpress*." See Attachment #3A, #3B and #C, District Grant Applications to USDLA, February, 2004, February, 2005 and January, 2007, p. 1. Because the term "AchieveXpress" was specifically referenced in the District's applications to USDLA, it was neither surprising nor unusual when USDLA repeated that term in its award letters. Furthermore, the District had no knowledge of what USDLA's letters to other communities said, so it would have no reason to believe it was a "a standard form letter".

(c) Because the District had no knowledge of USDLA grants being specifically earmarked for Achieve's services, it was unreasonable for USAC to conclude that its failure to provide evidence "refuting" this allegation is somehow proof of the allegation itself.

**III. The District is not responsible for FCC rule violations because Achieve "marketed" the service as a "no cost" and/or "fully funded", gave a "rebate" to the District, and/or "guaranteed" that the District would get a grant to cover the non-discount share, where Achieve never made such statements to the District.**

**Decision Letters:**

The Decision Letters acknowledged the District's argument that Achieve did not market its services as a "no-cost" service, nor did Achieve "guarantee" that USDLA would award grants to the District if Achieve was selected as the service provider. The District also stated that it did not receive any "rebates" from Achieve. The District admitted that Achieve informed them about the grants from USDLA that could cover

their non-discounted portion. However, the District indicated that Achieve also stated there were other sources for potential grants. The District maintained that its personnel completed the grant applications and worked directly with USDLA personnel to obtain the USDLA grants. The District reiterated that the USDLA grants were not tied to the selection of any specific vendor.

The Decision Letters disagreed with the assertion that “Achieve did not guarantee USDLA grants to applicants who selected Achieve's services” and that the USDLA grants were “not earmarked for Achieve's services”. SLD based this conclusion on the fact that it questioned Achieve and USDLA about whether USDLA grants were provided to other applicants who did not select Achieve as their service provider, and *neither party responded* to the question or provided evidence to show that the USDLA grants were not tied to Achieve's services.

The Decision Letters also noted that the technology services contracts between Springfield and Achieve contained specific provisions stating that the District was not liable for any of the costs associated with Achieve's services and that the costs would be covered in full through E-Rate funding and USDLA grants. See Oct, 25, 2005 Springfield/Achieve Technology Services Contract at § 3A (“It is expressly agreed and understood that in no event shall the City have any financial liability under this Agreement ...”); Aug. 3, 2007 Springfield/Achieve Technology Services Contract at § 3A (same). The Decision Letters indicate that this language further supports the finding that Achieve provided Springfield with “fully funded” services.

**District Response:**

- (a) As Mr. Hamel's Declaration points out, he reviewed the written proposals



submitted by Achieve concerning its proposed services in response to the Form 470 Applications. See Attachment #2, Exhibit A, Hamel Declaration, par. 2. Mr. Hamel states that Achieve *did not* market its service to the District as a "no cost" service, nor did it "guarantee" that the District would receive USDLA grants to pay its share of the Achieve funding request. Furthermore the District did not receive any "rebate" from Achieve for its portion of the cost. Mr. Hamel's Declaration states:

"4. Achieve's oral and written presentations to the District in connection with the Applications *did not* represent in any way that Achieve was offering a service that would be "no cost" to the District. Achieve did inform the District of the opportunity to apply for a grant from the United States Distance Learning Association ("USDLA") to cover the District's share of the cost of the services ("District Share"), covered by the applications ("Grant"). Achieve also generally noted that there were other potential sources of such grants. However, Achieve *did not* represent either orally or in writing to the District, that if the District selected Achieve as its service provider and applied for such a Grant from USDLA that approval of the Grant by USDLA was *guaranteed*. Achieve *did not present an automatic Grant* from USDLA as part of the Achieve service proposal made to the District. Furthermore, USDLA specified that the Grant award was *not contingent* upon the selection of Achieve for the provision of services to the District."

See Attachment #2, Exhibit A, Hamel Declaration, par. 4. (Emphasis supplied)

Mr. Hamel's Declaration indicates that the District, not Achieve, obtained, prepared and filed its own grant applications with USDLA. Achieve was not involved in any way with the grant application process. Rather, District personnel dealt directly with USDLA personnel in completing the necessary forms to apply for the Grants. See Attachment #2, Exhibit A, Hamel Declaration, par. 5.

(b) Because the District had no knowledge of or access to documents or information regarding whether USDLA awarded grants to other communities who did not select Achieve as their service provider, it is unreasonable for USAC to conclude that the

District's failure to provide this evidence refutes the argument that the USDLA grants were not in fact tied to Achieve's services.

(c) The District's contracts with Achieve reference the E-Rate grant and the USDLA grants because the District had already received the award of the USDLA grants at the time the contracts were executed. At that point the District knew it would not have to provide its own funds toward Achieve's services, because the USDLA grants covered the District's non-discount share. The contract language does not prove Achieve was providing "fully funded" services. The contract provides that the total funding was provided by E-Rate and the grant from USDLA. The contracts are appended hereto as Attachment #4A through #4D, please note the following paragraphs: 3(B), 3(C), and 3(D).

The District fully disclosed the contracts to USAC/SLD during its Review Process, when Mr. Hamel sent copies of the contracts to the SLD representative along with other information about the USDLA grants in January, 2006 . See Attachment #2, Exhibit D-2, 7/19/06 email from Robert Hamel to Paul Stankus, 4th paragraph, (referencing documents submitted to USAC/SLD in January, 2006, including the contracts). The District also disclosed these grants on the Form 471's filed with USAC/SLD. Id., 5th par.

The District had no knowledge of any improper relationship between Achieve and USDLA until it received the COMADs. The contracts also required Achieve to comply with all applicable laws related to the services. See Attachment #4A through 4D, par. 11.

**IV. The lack of evidence showing that USDLA awarded grants to other E-Rate applicants who did not select Achieve as their service provider does not support a finding that Achieve "waived" the District's non-discount portion of the cost of the services, or rise to the level of an FCC**

**rule violation by the District, where Achieve never made an offer to the District to "waive" its costs, where the District complied with USAC procedures allowing grants to be used for non-discount costs, and where the District had no knowledge of what other grants were awarded by USDLA. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

**Decision Letters:**

The Decision Letters recognize the District's argument that Achieve never waived its non-discounted portion of costs. Springfield reiterates that the USDLA grant was used to cover its costs and that program rules allowed applicants to use such grants to cover their non-discounted costs.

The Decision Letters agreed that grants and donations are permissible sources of resources that an applicant may use to demonstrate that funds exist to pay the applicant's non-discounted portion of costs and that service providers are allowed to assist applicants in locating such grants. See Attachment #2, Exhibit C, Step 11 of USAC Procedures, Obligation to Pay Non-Discount Portion. However, the Special Compliance Review team questioned Achieve and USDLA regarding whether USDLA grants were provided to other E-Rate applicants who did not select Achieve as their service provider.

The Decision Letters concluded that the USDLA grants were earmarked for Achieve's services and Springfield did not pay its non-discounted portion of costs. This was based on the fact that neither the District, Achieve or USDLA "provided any documentation to refute SLD's finding that the USDLA grants were only provided to E-Rate applicants who selected Achieve's services", and the fact that the USDLA's grant award letters to the District in August 2005, February 2007, and January 2008 refer to the "Achieve Xpress Telecommunications distance learning project" despite the fact

Springfield had titled its project the "Springfield Digital Divide Project" in its grant application.

**District Response:**

(a) Achieve never offered to "waive" the District's non-discount portion nor did it "otherwise not require payment". See Attachment #2, Exhibit A, Hamel Declaration, par. 7.

The District's non-discount portion did not come "directly or indirectly" from Achieve. Rather, the grant came from USDLA in response to grant requests filed by the District without any participation by Achieve. See Attachment #2, Exhibit A, Hamel Declaration, par. 5.

This is in compliance with guidance offered to applicants on USAC's website, which advises applicants that it is permissible for them to use grant funds to pay for their non-discount portion. See Attachment #2, Exhibit C. The USAC website includes the following language in the section entitled "Step 11: Obligation to Pay Non-discount Portion" (located at <http://www.usac.org/sl/applicants/step11/obligation-to-pay.aspx>):

"Some service providers offer to help applicants locate grants to pay for their non-discount portion. Program rules do not restrict applicants from accepting grants from bona fide organizations, nor do they restrict service providers from attempting to help applicants obtain grants from such organizations, so long as the grants or organizations are independent of the service provider."

See Attachment #2, Exhibit C, excerpt from USAC website, "Step 11 - Obligation to Pay Non-discount Portion".

The FCC has identified grants or donations to E-Rate Program applicants as a permissible source of the resources that an applicant must demonstrate that it has in order to receive E-Rate Program support, i.e. the applicant's non-discounted share. See *In the*

*Matter of Requests for Review of the Universal Service Administrator by Academy of Excellence, Phoenix, AZ, et al.*, 22 FCC Rcd 8722 (2007).

Mr. Hamel's Declaration states that the District disclosed the application and award of the USDLA grants covering the District's share to USAC throughout the E-Rate application process, selective review process and service invoicing process. See Attachment #2, Exhibit A, Hamel Declaration, par. 8.

In addition, as described in the District's Response to Section I, in par. (a), Mr. Hamel stated that Achieve *did not* market its service to the District as a "no cost" service, nor did it "guarantee" that the District would receive USDLA grants to pay its share of the Achieve funding request. Furthermore the District did not receive any "rebate" from Achieve for its portion of the cost. See Attachment #2, Exhibit A, Hamel Declaration, par. 4.

(b) The Decision Letters agreed that grants and donations are permissible sources of resources that an applicant may use to demonstrate that funds exist to pay the applicant's non-discounted portion of costs and that service providers are allowed to assist applicants in locating such grants.

Mr. Hamel's Declaration indicated that the District, not Achieve, obtained, prepared and filed its own grant applications with USDLA. Achieve was not involved in any way with the grant application process. Rather, District personnel dealt directly with USDLA personnel in completing the necessary forms to apply for the Grants. See Exhibit A, Hamel Declaration, par. 5.

(c) Because the District had no knowledge of or access to documents or information regarding whether USDLA awarded grants to other communities who did not select

Achieve as their service provider, it is unreasonable for USAC to conclude that the District's failure to provide this evidence refutes the argument that the USDLA grants were not in fact tied to Achieve's services. See part III, District Response, par. (b) above.

(d) As described in the District's Response in part II, par. (b) above, the District's grant applications to USDLA referred to the selection of Achieve Telecom as its selected vendor, and referenced that Achieve's distance learning transmission service was called AchieveXpress." See Attachment #3A, 3B, #3C, District Grant Applications to USDLA, p.1. Because the term "AchieveXpress was specifically referenced in the District's applications to USDLA, it was neither surprising nor unusual when USDLA repeated that term in its award letters. Furthermore, the District had no knowledge of what USDLA's letters to other communities said, so it would have no reason to believe it was a "a standard form letter".

(e) Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds, and whether it is equitable to grant a limited waiver of FCC rules in the public interest.

It is unreasonable and inequitable for USAC to find the District committed violations of FCC rules based on information and documents which the District had no knowledge of. The District respectfully requests that the FCC direct USAC to discontinue recovery action against the District, or in the alternative, that the FCC grant a limited waiver based on equitable considerations, in the public interest.

Intent is relevant to apportionment/equity in deciding waivers.

**V. If USDLA failed to pay the full amount of the grant covering the District's non-discount share of the services to Achieve, this does not rise to the level of an FCC rule violation by the District, where the District had no knowledge of the issue until it was raised in the**

**Administrator's decisions. USDLA made the grant payments directly to Achieve, not to the District. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

**Decision Letters:**

The Decision Letters state there is evidence that USDLA did not provide the funding for the grant awarded to Springfield. The Decision Letters reference IRS Form 990s for each of the funding years, indicating that on Line 22, no grants were listed for any of the four (4) years, and noting that the District grants totaled between 1/3 and 1/2 of USDLA's total revenues for the particular year. The Decision Letters also noted that USDLA's revenues did not cover its expenses in Funding Year 2004 and 2005, and it did not appear that USDLA had sufficient funds to cover the grants to the District.

**District Response:**

In the grant award letters to the District, USDLA indicated that it would pay the grant funds to Achieve directly, not to the District. For example, the August 31, 2005 grant affirmation letter from USDLA to the District states: "The USDLA grant portion will also be paid directly to the vendor, Achieve Telecom, by the USDLA, subject to funding, utilizing the following procedures. . . ". Attachment #6, 8/31/05 Letter from USDLA to District. 2nd paragraph. As a result, the District had no knowledge that USDLA was either not paying Achieve, or not paying Achieve in full, for the grant amounts. The District was unaware that this was an issue until it received the Decision Letters. (Recently, Achieve provided the District with copies of six (6) canceled checks from 2006 and 2007 showing payments from USDLA to Achieve, but not in the full amount of the grants. See Attachment #7.)

The District did not have access to USDLA's tax returns reviewed by USAC, and

had no reason to suspect that the grant monies had not been paid.

In the event the FCC finds that USDLA did not pay some or all of the grant funds to Achieve, this does not rise to the level of an FCC rule violation *by the District*, which had no knowledge of or complicity in, such failure. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.

**VI. The determination that the District violated FCC rules requiring a "fair and open" competitive bid process because Achieve had an unfair competitive advantage by "guaranteeing" grants to the District, by offering "fully funded" services to the District, and by making a "no cost guarantee", is not supported by the evidence, where no such representations were ever made to the District. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

**Decision Letters:**

The Decision Letters determined that *both* Achieve and the District are *responsible* for the rule violations "because the District was not able to conduct a fair and open competitive bidding process" based on Achieve's no-cost guarantee, and Achieve gained an unfair competitive advantage by guaranteeing USDLA grants designed to cover the District's non-discounted portion of costs of Achieve's services.

FCC rules require a fair and open competitive bidding process. Under the Commission's rules, service providers may not participate in the bidding process other than as bidders because, as the Commission has ruled, "direct involvement in an application process by a service provider would thwart the competitive bidding process." Communications between applicants and service providers that unfairly influence the outcome of the competition, provide inside information, or allow the provider to unfairly compete taints the competitive process.

The Decision Letters also state that in order to be sure that a fair and open



competition is achieved, any marketing discussions held with service providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with the service provider prior to the competitive bidding that would unfairly influence the outcome of a completion or would furnish the service provider with "inside" information or allow it to unfairly compete in any way.

**District Response:**

(a) There is no evidence that Achieve made a "no cost" guarantee to the District. As described in the District's Response to Section I, in par. (a), Mr. Hamel stated that Achieve *did not* market its service to the DISTRICT as a "no cost" service, nor did it "guarantee" that the DISTRICT would receive USDLA grants to pay its share of the Achieve funding request. See Attachment #2, Exhibit A, Hamel Declaration, par. 4.

(b) There is no evidence that Achieve ever advised the District that it was "guaranteed" to get a grant from USDLA to cover the non-discount portion of Achieve's services. This was specifically refuted in Mr. Hamel's Declaration filed with the USAC appeal, in which he specifically stated that no such representation was made by Achieve:

"Achieve did not represent, either orally or in writing to the District, that if the District selected Achieve as its service provider and applied for a Grant from USDLA, that approval of the Grant by USDLA was guaranteed. Achieve did not present an automatic Grant from USDLA as part of the Achieve service proposals made to the District. Furthermore, USDLA specified that the Grant awards were not contingent upon the selection of Achieve for the provision of services to the District."

See Attachment #2, Exhibit A, Hamel Declaration, par. 4.

(c) The District applied for and received approval of what it reasonably believed were

legitimate grants to pay its non-discount portion of Achieve's services, which it reasonably believed was authorized by USAC procedures. Attachment #2, Exhibit C, Step 11, Payment of Non-Discount Share. The District had no knowledge of any improper relationship or partnership between Achieve and USDLA.

(c) There is no suggestion in the Decision Letters that the District did not comply with USAC's requirements for posting the Form 470, waiting the required period to receive responses, and obtaining bids. Achieve was listed on the Massachusetts state contract as an approved provider of this service and was the only bid received by the District.

(d) The Decision Letters determine that District violated the fair and open competitive bidding requirements *solely* because of the actions of Achieve and USDLA, which the District had no knowledge of or complicity in, stating that "intent is not a relevant factor" in determining rule violations. However, intent is a legitimate factor to consider in the discretionary determination of which party should be responsible for repaying the amounts disbursed. See discussion in Argument VIII, District Response, par. C. It would be inequitable and a violation of public policy to require the District to repay the entire amount disbursed where it had no knowledge of any inappropriate relationship between Achieve and USDLA, and where Achieve never guaranteed a no-cost service or that the District would receive a grant from USDLA.

**VII. The finding that the District failed to pay its non-discounted portion of the service because Achieve provided its services at "no-cost" to the District is not supported by the evidence, and does not rise to the level of an FCC rule violation, where the District was awarded what it reasonably believed to be a legitimate grant from USDLA covering the cost of its non-discount share, as authorized by USAC procedures, and Achieve never made a "no cost guarantee" to the District. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

### **Decision Letters:**

The Decision Letters acknowledged the District's argument that it should not be held liable for any program violations because it has complied with FCC requirements and disclosed the use of USDLA grants to SLD. However, USAC determined that the District violated FCC rules requiring applicants to pay the non-discounted portion of the costs. USAC determined it was "clear" that the District failed to pay its non-discounted portion of service "because Achieve provided its services at no-cost to Springfield".

The Decision Letters explained that "requiring schools and libraries to pay a share of the cost should encourage them to avoid unnecessary and wasteful expenditures because they will be unlikely to commit their own funds for purchases that they cannot use effectively." In 2003, FCC clarified and codified this restriction, explaining that the rules "require[] that an entity must pay the entire undiscounted portion of any services it receives through the libraries and schools program."

### **District Response:**

(a) No cost service: As described in the District's Response to Section I, in par. (a), Mr. Hamel stated that Achieve *did not* market its service to the DISTRICT as a "no cost" service, nor did it "guarantee" that the DISTRICT would receive USDLA grants to pay its share of the Achieve funding request. Furthermore the DISTRICT did not receive any "rebate" from Achieve for its portion of the cost. See Attachment #2, Exhibit A, Hamel Declaration, par. 4.

(b) The Decision Letters agreed that grants and donations are permissible sources of resources that an applicant may use to demonstrate that funds exist to pay the applicant's non-discounted portion of costs and that service providers are allowed to

assist applicants in locating such grants. See also Attachment #2, Exhibit C, USAC Procedures, Step 11.

(c) The District fully disclosed the grants to USAC on the Form 471's filed with USAC/SLD (See excerpts in Attachment #5), and Mr. Hamel provided copies of the grant award letters to USAC/SLD during the January, 2006 Selective Review process, when the SLD examiner asked the District why the non-discount share was being paid by a 3<sup>rd</sup> party (USDLA). See Attachment #2, Exhibit D-2, Hamel email to Paul Stankus/SLD.

The District had no knowledge of any improper relationship between Achieve and USDLA until it received the COMADs. The District fully disclosed the grants to USAC.

(d) The Decision Letters determine that District violated FCC rules requiring the payment of its non-discount share because Achieve made a "no-cost guarantee" and "guaranteed grants". The District refutes these statements and specifically indicates these statements were never made to the District. The District had no knowledge of any inappropriate relationship between Achieve and USDLA and applied for and was awarded what it reasonably believed to be a legitimate grant from USDLA covering the cost of its non-discount share, as authorized by USAC procedures.

The Decision Letters conclude that it does not matter that the District did not know of the improper relationship because "intent is not a relevant factor" in determining rule violations. However, intent *is* a legitimate factor to consider in the discretionary determination of which party should be responsible for repaying the amounts disbursed. See discussion in Argument III, District Response, par. c. It would be inequitable and a violation of public policy to require the District to repay the entire amount disbursed (\$1,792,624.00) where it had no knowledge of any inappropriate relationship between

Achieve and USDLA, and where Achieve never guaranteed a no-cost service or that the District would receive a grant from USDLA, and the District believed it was following USAC procedures by using the USDLA grant to cover its non-discount share.

**VIII. The determination that "both the District and Achieve are responsible for FCC rule violations" because (the District) was not able to conduct a fair and open competitive bidding process based on Achieve's "no cost guarantee", and Achieve gained an unfair competitive advantage by "guaranteeing" USDLA grants designed to cover (the District's) non-discounted portion of the costs of Achieve's services", is not supported by the evidence and is inequitable, where the District received what it reasonably believed to be a legitimate grant from USDLA covering those costs, as authorized by USAC procedures, and the District had no knowledge of any partnership or inappropriate relationship, or "guarantee" arrangement between Achieve and USDLA, and Achieve never guaranteed a "no cost" service to the District. Intent is a relevant factor in the discretionary determination of which party should be ordered to repay program funds.**

**Decision Letters:**

The Decision Letters find that both Achieve and the District are responsible for these rule violations because the District was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and Achieve gained an unfair competitive advantage by guaranteeing USDLA grants designed to cover Springfield's non-discounted portion of costs of Achieve's services.

The Decision Letters determined that the competitive bidding process in this matter was not fair or open because of Achieve offering to provide fully funded services by using USDLA's grants to cover Springfield's share of costs.

As a result, the appeal was denied in full for all four (4) funding years. The Decision noted that FCC rules require USAC to rescind funding commitments in all or part, and recover funds when USAC learns that funding commitments and/or disbursements of funds were inconsistent with program rules. In particular, FCC rules require USAC to

"recover the full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 of [FCC's] rules and amplified in related Commission orders." Moreover, FCC rules require "that all funds disbursed should be recovered for any funding request in which the beneficiary failed to pay its non-discounted share."

**District Response:**

(a) As Mr. Hamel's Declaration points out, Achieve *did not* market its service to the District as a "no cost" service, nor did it "guarantee" that the District would receive USDLA grants to pay its share of the Achieve funding request. See Attachment #2, Exhibit A, Hamel Declaration, par. 4. Furthermore, there was never an offer by Achieve to "waive" the District's non-discount share, to otherwise not require payment of the District's share, or to give the District a "rebate". Id., par. 7. In addition, the District was not aware of the existence of any alleged partnership between Achieve and USDLA. Id., par. 6.

USAC's guidance to applicants indicates that is permissible for Applicants to use grant funds to pay for their non-discount portion. See Attachment #2, Exhibit C, excerpt from USAC website, Step 11, 7th paragraph. There was no violation of USAC's program rules for the District to use the USDLA grant to pay its non-discount share.

For each year on appeal, the District was awarded a grant from the USDLA, which was used to satisfy the District's co-pay portion of the application. This fact was disclosed to USAC/SLD in each instance. For example, in 2005 and 2006, the District checked box 25f on Block 6 of the Form 471 application indicating that a service provider listed on the Forms 471 had provided assistance to the District in locating funds

in item 25e. See Attachment #5. The District had one oversight in 2005, as this was the first year the Form 471 included box 25f and it was overlooked, however, the District clarified this issue in response to questions raised by USAC/SLD during subsequent PIA reviews. (See Attachment #2, Exhibits D-1 and D-2, emails between Robert Hamel and the USAC PIA reviewer dated June 1, 2006 (Exhibit D-1), June 18, 2006 and June 19, 2006 (Exhibit D-2).

(b) The District denies that it violated any program rules. If the FCC determines that there were program rule violations based on an allegedly improper relationship between Achieve and USDLA that the District had no knowledge of or participation in, it would be inequitable to hold the District accountable for such actions and would violate public policy to require the District to reimburse over \$1.79 million dollars in funds disbursed to Achieve.

(c) Intent is Relevant:

Throughout this Request for Review and Waiver, the District has argued that it had no knowledge of or complicity in the actions of Achieve and USDLA cited in the Decision Letters which constitute violations of FCC Rules. In fact, the Decision Letters do not allege any violations of program rules committed *knowingly* by the District. In the *FCC Fifth Report and Order*, issued by the FCC on August 15, 2004, FCC 04-190, the FCC discussed the standard for determining whether there has been a statutory or rule violation as follows:

"The standard for determining such a violation is the same standard we use in our enforcement actions: specifically whether a party has *willfully* or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, based on a preponderance of the evidence."

*Federal Communications Commission Fifth Report and Order*, August 15, 2004, FCC 04-190, p. 26, citing 47 U.S.C. sec. 503(b) and 47 C.F.R. sec. 1.80(a)(1). (Emphasis added). According to the *Fifth Order and Report*, a party "willfully" violates the Communications Act or a Commission rule or order "when it knows it is taking the action in question, irrespective of any intention to violate the Commission's rules." *Id.* at fn. 131. Here the District did not "willfully" violate the FCC rules, as it had no knowledge of the alleged acts by Achieve and USDLA constituting the violations.

The FCC has discretion to make determinations of FCC rule violations on a case-by-case basis, after examining specific factual circumstances, and can consider hardship, equity and effective implementation of overall policy. *Id.* at p.11, and fn. 134. p.26. In addition, the FCC may find there are mitigating circumstances which warrant waiver of a rule when "good cause" is demonstrated. *Id.* at fn. 134, p. 26.

In the Matter of "*Request for Waiver or Review of a Decision of the Universal Service Administrator by Exigent Technologies, Parsippany, NJ, Schools and Libraries Support Mechanism*", DA 09-2245, released October 30, 2009, the FCC considered a request for review of an order directing recovery of funds from a service provider who did not require applicants to pay the non-discounted portion of the price of sales and equipment provided. The FCC noted that when the beneficiary fails to pay its non-discount share, "all funds disbursed should be recovered." The FCC stated:



"Furthermore, in terms of who to recover from, the Commission has stated that 'recovery action should be directed to the party or parties that committed the rule or statutory violation in question'."

*Id.* at pp. 4-5. The FCC *ordered that the funds be recovered from the service provider*, and *not* from the five schools districts involved in the applications. *Id.* at p. 1.

The District was not responsible for any violations of USAC rules for the years on appeal, and respectfully requests the FCC to allow the Review and order USAC to discontinue recovery actions against the District, or in the alternative, to grant a limited waiver on equitable grounds, in the public interest, and not pursue recovery of the disbursed funds against the District, which had no knowledge or complicity in the alleged misconduct, and did not willfully violate any FCC rules.

**Conclusion and Request for Relief and/or Waiver:**

The District respectfully requests that the FCC grant the review of the Decision Letters and find the District did not willfully violate FCC rules, or in the alternative, that the FCC apply principles of equity under the circumstances and grant a waiver in the public interest, and find no violation by the District and discontinue any recovery action against the District for the years in question, as authorized by 47 CFR 1.3.

The District was not responsible for the violations of FCC rules or USAC procedures for the years on appeal. For each year on appeal, the District fully disclosed the existence of the USDLA grants and their source, and complied with USAC/SLD's program requirements. After disclosing such grants, USAC approved funding to the DISTRICT for each of the four (4) years on appeal. The District acted in reliance on USAC's approvals of these applications, reasonably believing that the grant arrangement, which was consistent with guidance to applicants on USAC's website, was acceptable to USAC.

See Attachment #2, Exhibit C.

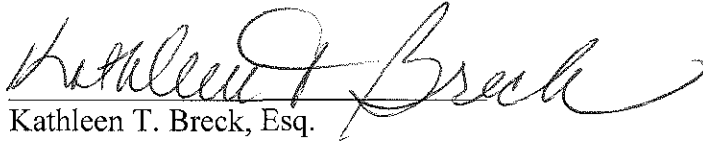
The District respectfully requests that the FCC grant the Request for Review of each of the four (4) Decision Letters and direct the USAC to discontinue recovery action against the District for the amounts ordered to be recovered, as the District was not responsible for the FCC rules violations. In the alternative, the District requests, pursuant to 47 C.F.R. 1.3, that the FCC grant a limited waiver of 47 C.F.R. 54.523 and 47 C.F.R. 54.504 ordering the USAC not to seek recovery of the amounts disbursed from the District on equitable grounds, in the public interest, in light of the District's lack of knowledge of, or complicity in, any FCC rule violations, or USAC program rules.

Furthermore, the District respectfully requests that in the event USAC denies these appeals and finds that there were program rule violations based on an allegedly improper relationship between Achieve and USDLA that the District had no knowledge of or participation in, the District respectfully request that it be excluded from any punitive action or demands for reimbursement in connection with these grants. The District maintains it would be inequitable and against public policy to seek recovery of the disbursed funds, based on allegations that were completely unknown to the District, and which the District has no participation in, then asking the District to repay over \$1.79 million dollars that it never received.

Should you have any questions regarding this Request, please contact the District's counsel listed below.

Thank you for your assistance in this matter.

Respectfully Submitted,  
The DISTRICT - Springfield Public Schools:  
By its counsel:

A handwritten signature in cursive script, reading "Kathleen T. Breck". The signature is written in dark ink and is positioned above the printed name.

Kathleen T. Breck, Esq.

Deputy City Solicitor

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Cc: Mayor Domenic Sarno, City of Springfield, MA  
Dr. Alan Ingram, Superintendent of Schools

**CERTIFICATE OF SERVICE**

I, Kathleen T. Breck, counsel for the City of Springfield (Mass.) Public Schools, hereby certify that I served a true copy of the above-referenced "Request for Review and Waiver" to the Administrator of USAC as required by 47 CFR 54.721, and to counsel for Achieve Telecom Network of MA, LLC, by mailing copies of the same to the addresses listed below, by First Class Mail, postage prepaid, on this 24th day of June, 2010, the date the same was filed electronically with the Federal Communications Commission.

**To the USAC Administrator:**

Letter of Appeal  
Schools and Libraries Division - Correspondence Unit  
Universal Services Administrative Company  
30 Lanidex Plaza West  
PO Box 685  
Parsippany, NJ 07054-0685

**To Counsel for Achieve:**

Paul F. Saba, Esq.  
KPR Associates  
304 Newbury Street #542  
Boston, MA 02115

By: 

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